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FROM Robert Carlstrom
(x3856)

DATE 9/21/78

REMARKS

Justice (FBI) testimony on
FBI Charter-Policy for Sept. 26

Request your comments on
attached testimony by
cob Friday, September 22.

Thanks.

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FORM 4
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STATEMENT
OF
WILLIAM WEBSTER
DIRECTOR
FEDERAL BUREAU OF INVESTIGATION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ADMINISTRATIVE AND PROCEDURE
UNITED STATES SENATE

CONCERNING
FBI CHARTER - POLICY

ON
SEPTEMBER 26, 1978

I welcome the opportunity to discuss with you today the outlines of a law enforcement charter for the Federal Bureau of Investigation..

When I appeared before the Judiciary Committee for confirmation hearings, several months ago, I supported the idea of a charter for the FBI. I want to reaffirm that commitment today and assure you that I consider it to be one of my highest priorities as Director.

I believe we all recognize that this country's primary Federal law enforcement agency should not be expected to carry out its important and sensitive work without a law clearly describing its powers, functions and responsibilities. But despite its long history, the Bureau has received very little statutory guidance from the Congress. Our basic investigative jurisdiction is found in 28 U.S.C. 533 which authorizes the Attorney General to appoint officials to detect and prosecute offenses against the United States, assist in the protection of the President, and investigate matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General. There are other statutes, such as the Congressional Assassination, Kidnapping and Assault Act which vest in the Bureau special

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responsibilities to investigate criminal violations. This statutory base is supplemented in some areas by a series of Executive orders and directives dating back several decades.

In recent years some committees of Congress have raised serious questions as to whether this authority was adequate to cover some of the investigative activities engaged in by the Bureau and the debate continues to this date without successful resolution.

A charter can fill this void. It will let us know that we are doing what the American people and their elected representatives expect of us.

It will permit our Special Agents to act with decisiveness and with the knowledge that what they are doing is authorized and lawful.


It will enable us to make policy decisions involving the balance between individual rights and law enforcement with the guidance of those in government obligated to oversee and to approve our operations.

In short, it will help ensure that the Bureau accomplishes its mission in an effective and lawful manner.

These are the benefits of a charter. Writing one, however, will not be a simple task. There are a great many areas which the charter might profitably address -- some more

important and perhaps more controversial than others, and some which have already been the subject of discussion in other proposed legislation.

I would like to begin the discussion today by expressing some ideas about the general framework of the charter. It is important to bear in mind that this is an unprecedented exercise in the legislative process. We are trying to articulate the circumstances in which the government may properly initiate an inquiry concerning its citizens. Historically those judgments have been left to the Executive Branch as an exercise of administrative discretion, provided those inquiries did not infringe on any statutory or Constitutional right. We all agree that this is a proper subject of Congressional concern but I would caution against excessive legislative detail that unduly restricts the flexibility of the investigative process or the Government's ability to respond effectively to threatened violations of law.

 I would hope that the FBI charter will be a combination of statutory and administrative rules with oversight mechanisms to insure compliance and accountability. A statutory charter should clearly delineate the investigative responsibilities of the Bureau. It should highlight special concerns of the Congress but leave broad discretionary powers in the investigative

process to the Executive Branch. We accept the idea that one function of the charter will be to provide general boundary lines for our investigative activities. But we are persuaded also that this can be achieved without explicitly detailing when and how an investigation is to be conducted.

I am confident that Department of Justice guidelines and internal Bureau controls in support of basic legislation can insure that investigations are conducted within the law. As I indicated, the principal advantage of this approach is that guidelines and internal controls offer flexibility. If conditions change, guidelines can be changed -- probably more expeditiously than could a statute. It also permits a measured response to circumstances, allowing the Government to proceed with the minimal degree of intrusion required to accomplish its investigative purposes.

Of course, changes in the guidelines would be made openly. Congress in the exercise of its oversight function would review our implementation of those guidelines and if unsatisfied could resort to its authorization or appropriation authority or even to specific legislation that would preempt those guidelines and settle any unresolved issues. I believe an accommodation could, however, be reached, that would make this unnecessary.

Some have argued the advantages of a very particularized statute backed by civil and criminal sanctions. Such a law might indeed reduce the chances of illegal conduct, but I believe that it would add only marginal protection to that provided by a combination of statute and guidelines. It could also seriously reduce our investigative effectiveness by inviting litigation in the initial stages of investigations and reducing the Bureau's discretionary authority in the varied kinds of cases it investigates.

This brings us to some of the fundamental issues that must be resolved in defining the content of the charter and deciding the means and methods to carry out the Bureau's assigned responsibilities. I will address some of the more significant areas of concern but I am sure that others will arise in the course of our discussion today or in the drafting process.

To begin with, there is the question of whether the FBI should be authorized to conduct "intelligence" investigations. My response will depend in large part on how we define the term "intelligence." I certainly agree with former Attorney General Levi that "government monitoring of individuals or groups because they hold unpopular or controversial political views is intolerable in our society." With the exception of background

investigations for Federal employment purposes or foreign counterintelligence responsibilities, the focus of investigation must be on the detection and prosecution of unlawful conduct. The Bureau should not be in the business of gathering information, as distinguished from evidence, to meet the general and unspecified needs of the Federal government.

But I think we should recognize that investigations of criminal enterprises, whether in the organized crime or domestic security field, differ in several important respects from an ordinary criminal investigation. As a practical matter, the organization provides a life and continuity of operation that are not normally found in regular criminal activity. As a consequence, these investigations may continue for several years. In addition, as Justice Powell noted, the focus of domestic security investigations "may be less precise than that directed against more conventional types of crime." c. etc.

Unlike the usual criminal case there may be no completed offense to provide a framework for the investigation. ~~"The~~
~~essence of intelligence work is~~ *It often requires* the fitting together of bits and pieces of information, many meaningless by themselves, to ascertain if there is a mosaic of criminal activity. For this reason, the investigation is broader and less discriminate than usual, involving "the interrelation of various sources and types of information." When the term intelligence is used low.

in this context it refers to the process of information collection rather than the end product of investigation. It is important to bear these distinctions in mind and to have a common understanding of the terms so that we do not enact a charter that gives the Bureau both more and less authority than it needs to fulfill its investigative responsibilities.

This leads us to the question of how we are going to deal with domestic security investigations. As you know, these investigations are conducted in accordance with Attorney General's guidelines and are limited to the collection of information about activities that may involve the use of force or violence in violation of Federal law. At the present time, there are approximately thirteen organizations and less than 40 individuals under investigation in this area of our responsibilities. This represents a substantial reduction from the number of cases investigated in prior years. Nevertheless, there are those who believe that domestic security investigations should be discontinued altogether and that the Bureau should accomplish its investigative needs through normal criminal investigations.

One of the problems with this approach is that it seems to misconceive both the scope and purpose of an ordinary criminal investigation. As I indicated earlier, a criminal

investigation of a completed criminal act is normally confined to determining who committed the act and with securing evidence to establish the elements of the particular crime. It is, in this respect, self-defining. An investigation of an ongoing criminal enterprise, focused on a pattern of criminal activity, must determine the size and composition of the group involved, its geographic dimensions, its past acts and intended criminal goals, and its capacity for harm. While a standard criminal investigation terminates with the prosecution or decision not to prosecute the individual who has been apprehended, the investigation of a criminal enterprise does not necessarily end when one or more of the participants has been prosecuted. Thus, limitations perfectly appropriate to the usual criminal investigation could result in foreclosing investigations directed at organized crime or terrorism.

However we decide this issue, I think we should also remember that special rules may be required in such cases to protect important Constitutional rights. It is difficult to investigate criminal activities that are motivated by political ideology without First Amendment values coming into play. For one thing, the membership of an organization may undergo constant change making it difficult to identify the leaders or "active" members. It is not always clear whether any given

individual supports the primary objectives for the organization and particularly whether he is willing to use force or violence to accomplish those objectives. The person who becomes a member in such an organization may be doing nothing more than "signifying his assent to its purpose [or offering] only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing." Unless this sorting-out process is conducted under carefully limited rules, we run the risk of having the government intrude on legitimate expression of political views.

A related problem concerns the authority of the Bureau to investigate in advance of criminal activity. What is at issue here is the early detection of crime. Preparatory conduct has always been a matter of legitimate concern for society. The conspiracy and attempt laws have been the principal doctrinal devices by which the substantive criminal law has attempted to deal with this problem. That may be adequate for prosecutive purposes. Indeed it makes sense to require a high order of proof before one can be convicted for activities that fall short of the intended harm. But the investigative process must begin well in advance of crime if it is to be effective. This is particularly true where the objectives, as in domestic terrorism, is to frustrate or

or minimize the intended acts of violence. The problem comes in knowing how far in advance of crime the government may properly initiate its inquiry. Should it begin at the planning or conspiracy stage or when a crime is "soon to be" or "about to be" committed? If the investigation begins prematurely, it may deal with marginal or speculative threats to society or with entirely innocent conduct. If commenced too late, it becomes difficult if not impossible to gather the information which is needed for the government to respond effectively. It will not be easy to find the right combination of words in the charter to meet these competing concerns.

I know this Subcommittee has identified additional areas of concern over the past few months, particularly with regard to the use of informants and their unauthorized participation in criminal activities. We must also address questions regarding appropriate rules for undercover Agents, and the use of other covert investigative techniques, receipt of unsolicited information, access to third party records, exchange of information with foreign governments, retention of files, and our authority to take preventive action in cases of urgent necessity.

There are several other important areas unrelated to criminal investigations which raise significant charter issues that have not been discussed in detail in this series

of hearings. I have in mind particularly the question of the role of the FBI in collecting information on civil disorders and demonstrations and the background investigation functions of the FBI.

Among the responsibilities of the Attorney General in his capacity as legal adviser to the President is advising the President as to when it is appropriate for the Federal government to play a role in handling riots and other civil disorders. While such outbreaks are normally a state responsibility, if the enforcement of Federal law is jeopardized, civil rights are threatened, or the disturbance is beyond the capacity of the state to handle, the Federal government may have an obligation to provide assistance. This is recognized both in Article IV of the Constitution and in the provisions of Chapter 15 of Title 10 of the United States Code.

The key to determining the proper Federal role in civil disorders is an accurate assessment of the facts. While state and local authorities can and do provide information to the Federal government in most instances this information is frequently oriented toward the state's concerns. Thus, it is also important to obtain facts independently. Traditionally, Attorneys General have asked the FBI to provide this information.

As the Subcommittee is aware, Attorney General Levi promulgated guidelines outlining the FBI's responsibility to collect this information and placing limits on the type of information to be collected. These guidelines authorize the collection of information concerning civil disorders only upon specific request of the Department and only for limited periods of time. They restrict the information to be collected to that which is directly relevant to the decision to provide Federal assistance in civil disorders. Further, the guidelines limit the manner in which information may be collected and provide that information not be indexed in a manner which permits retrieval by the name of individuals who are not under investigation for a crime.

In our view it is important to focus on this area of FBI responsibility in the context of a legislative charter. While we are satisfied that the guidelines draw a proper balance between Federal concern with civil disorders and intrusion into the proper role of the States, the guidelines themselves cannot confirm that this is, indeed, a proper function to be performed by the FBI. Only the Congress through enactment of a charter can make that decision.

A related area of FBI responsibility, also recognized in the guidelines, is the collection of information concerning planned demonstrations which will require some Federal assistance

or response. This is an even more delicate issue since it involves, of necessity, the collection of information concerning the exercise of legitimate First Amendment rights. The Court of Appeals for the Second Circuit has recognized that the government has a legitimate need for information concerning demonstrations which are planned at Federal facilities in order to provide the necessary health and safety services. Fifth Avenue Peace Parade Committee v. Kelley, 480 F 2d 326 (2nd Cir. 19) cert. denied, 415 U.S. 948. In the past the FBI has sometimes been used to collect this information simply because it has the necessary personnel in field offices throughout the country. The FBI, however, is not ordinarily responsible for providing the health and safety measures in connection with such demonstrations. Thus, the question is raised whether an agency whose primary function is law enforcement should collect this information.

The existing guidelines recognize that the FBI may, for practical reasons, be asked to obtain the necessary information. The focus of the guidelines is on assuring that only that information which relates to health and safety concerns is collected, that it is collected by the least intrusive means and that it is collected in a manner which does not have a chilling effect on the exercise of First Amendment rights. The consideration of a charter, however, offers an opportunity to consider the fundamental question

whether the FBI should ever be used to collect this information and, if not, by what means the Federal government should acquire it when necessary.

An even more complex area of FBI responsibility which has not yet been explored in these hearings involves the conduct of background investigations, particularly the loyalty-security investigations conducted under Executive Order 10450. As you are aware, the FBI conducts background investigations not only on its own employees but on prospective employees of the Department of Justice, Presidential appointees and employees of certain Federal agencies. Further, the FBI conducts background investigations of certain appointees of the courts and of staff of certain Congressional committees. Finally, the FBI is required to conduct investigations of any Federal employee or applicant concerning whom a question of loyalty has been raised. This latter responsibility is imposed by Executive Order 10450, signed in 1954. It is generally recognized that the order is outdated; its language is troublesome and it has fared badly in the courts. Nevertheless, it remains in effect and obligates the FBI to conduct investigations.

The question whether the FBI should conduct background investigations and, if so, of whom and under what circumstances must be addressed in the charter. The issues to be addressed

are exceedingly complex. They include such fundamental questions as the extent of the government's interest as an employer in the character of its employees and whether that interest differs in any particulars from the general interest of any employer in having qualified and honest employees. Should the government inquire into the "loyalty" of prospective employees and how can we define "loyalty" in meaningful terms? Is it appropriate for a law enforcement agency to be making such inquiries in connection with individuals it will not be employing itself? When inquiries are conducted who should have access to the information collected and how long should it be retained?

Quite frankly, we have been unable to resolve these issues ourselves. In part this is because the questions relate to the entire government and affect all three branches; they are not simply the concerns of the FBI alone. Resolving the role of the FBI in the conduct of background investigations will require consultation with the Office of the President, the Federal agencies for whom the Bureau now conducts such investigations, the Civil Service Commission, the Congress and the Administrative Office of the U. S. Courts. The process will be time-consuming and difficult. We cannot avoid the issue, however. It would be irresponsible to draft a charter delineating FBI responsibilities while remaining silent on the subject of FBI background investigations. We seek your

assistance in resolving these troublesome questions and defining in statutory terms precisely what role the FBI is expected to perform in this area.

I have described in very broad terms some of my principal concerns regarding the FBI charter. Although I have no specific proposals to make today, I hope to submit a draft charter to the Department of Justice and ultimately to this Subcommittee for its consideration. I believe we have already made considerable progress in this regard. Together we can fashion appropriate legislation for the Bureau that will protect society, its values, and the safety of its members.

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charters, Title II
Leg Staff

Webster Asks Panel To Give FBI Leeway In Proposed Charter

By Anthony Marro

Special to The Washington Star

FBI Director William H. Webster has urged Congress not to write a charter for his agency that "unduly restricts the flexibility of the investigative process" or the ability of the government to "respond effectively to threatened violations of law."

In testimony before the Senate Judiciary Committee yesterday, Webster said that while he is committed to the idea of a legislative charter to govern the bureau, he hopes it will be one that spells out what the bureau can do, and does not specify in great detail the things it cannot.

It was one of Webster's most detailed statements to date on the proposed charter, and during nearly three hours of testimony yesterday both he and Attorney General Griffin B. Bell urged the Congress to set broad guidelines for the future but not to permit, in Webster's words, "excessive legislative detail" in the document.

"WE ACCEPT the idea that one function of the charter will be to provide general boundary lines for our investigative activities," Bell said. "But we are persuaded also that this can be achieved without explicitly detailing when and how an investigation is to be conducted."

The testimony came as a subcommittee headed by Sen. James Abourezk, D-S.D., continued its hearings on various investigative techniques used by the bureau, and the degree to which they should or should not be governed by statute, rather than by the departmental guidelines now in effect.

Abourezk opened the hearing by altering a prepared statement to say that final passage of a charter is "a long ways off," rather than "still a ways off," as it had appeared in his text.

An American Civil Liberties Union official, Jerry Berman, however, said his group was heartened by Webster's testimony because "for the first time we're beginning to see that the charter is in progress . . . and optimistic that it will be introduced early next year."

THE PROPOSED charter, which has been urged on the Congress by both the Justice Department and various civil liberties groups, would spell out in detail for the first time the precise legal authority for various types of investigations, many of which have been conducted in the past on the basis of executive orders rather than clear legal authority.

Webster, in a lengthy prepared statement, said that the Congress will have to face a number of sensitive issues that the FBI cannot decide on its own, including the question of just how much investigating it can do of persons and groups not engaged in obvious, ongoing criminal conduct.

For example, he said that in dealing with terrorist groups, it often is necessary to begin the investigative process "well in advance of crime." But the problem, he said, is in determining just when an investigation may properly begin.

"If the investigation begins prematurely, it may deal with marginal or speculative threats to society or with entirely innocent conduct," he said. "If commenced too late, it becomes difficult if not impossible to gather the information which is needed for the government to respond effectively."

Berman, the ACLU official, said that in general his group prefers a criminal standard for beginning an investigation, but is willing to agree that in some cases low-level investigations could be warranted without probable cause that a crime had been or was about to be committed.

WEBSTER ALSO SAID it is up to Congress to determine whether the FBI should be made to continue its background investigations of persons being considered for jobs in other agencies, particularly investigations that center on "loyalty" rather than qualifications for a post. "Should the government inquire into the 'loyalty' of prospective employees, and how can we define 'loyalty' in meaningful terms," he said. "Quite frankly, we have been unable to resolve these issues ourselves."

In the past, the subcommittee has tried to come to grips with other issues that will have to be addressed in the charter, such as the sort of controls that should be placed on the use of informants, and the degree to which FBI agents should be able to commit minor, non-violent crimes in the course of their undercover work.

Yesterday, both Bell and Webster urged the Senate to have faith in the department guidelines, which are intended to curb abuses of investigative techniques. The guidelines, they said, are effective, and can be altered quickly to meet changing conditions.

This last argument was greeted with some skepticism by Abourezk, who suggested that the reason a statute is needed is to insure that it can't be changed quickly by a future administration—particularly one with less concern for civil liberties.